VAIRA & RILEY, P.C.

THE RELIABLE SOURCE

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The Reliable Source is a service of the law firm of Vaira & Riley for white collar criminal practitioners in the Eastern District of Pennsylvania. The newsletter provides a periodic review of current developments and trends in federal courts, the United States Attorney's Office, and federal agencies, with a substantial effort devoted to the sentencing process.

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SENTENCING REPORTS

The Reliable Source follows Eastern District sentencing proceedings that are generally not reported in published opinions. The departures and adjustments information is derived from personal interviews of practitioners and is offered as a guide for formulating arguments in similar situations.

Departures Granted in False Income Tax Returns Case

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United States v. Wilkens, 01-CR-476
Judge Berle M. Schiller

The defendant, a consultant for a United States Navy contractor, filed false tax returns, omitting commission income over a period of five years. A portion of the commissions was deposited into his business pension and profit sharing funds, but not reported as income. The offense was discovered when the defendant responded to a Department of Defense subpoena in an unrelated investigation. As part of that investigation, the defendant provided records of all of his accounts and commissions to investigators and the underreporting became evident. In 1999, he voluntarily admitted his offense in an interview with the AUSA. Upon completion of the Government's investigation, the defendant agreed to the IRS calculation of all taxes, interest, and penalties due. He remitted $500,000 to the United States Treasury and signed a plea agreement. Almost a year later, the United States Attorney endorsed the plea agreement. An Information was filed charging the defendant with four counts of False Income Tax Returns, in violation of 26 U.S.C. 7206(1).

The defense moved for departure on three grounds. The first was for the defendant's extraordinary acceptance of responsibility, pursuant to *United States v. Lieberman*, 971 F.2d 989 (3d Cir. 1992). The defense argued that the defendant's extraordinary acceptance was presented by his immediate payment of all taxes, interest, and

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penalties well before the Government endorsed the plea agreement and officially brought the instant action.

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The defense also argued for departure based on extraordinary family circumstances, pursuant to *United States v . Gaskill*, 991 F.2d 82 (3d Cir. 1993). The defendant, who suffers from an inoperable root aortic aneurysm, solely cares for his spouse, who is afflicted with a psychological disorder known as agoraphobia. The defendant's wife suffers unpredictable anxiety attacks, which simulate heart attacks, that are brought on by stress and exposure to unfamiliar individuals. She is reluctant to leave home and will not travel without the defendant. The defendant's closest kin live in Maryland.

The final ground for departure was based on the combination of all the departure factors, pursuant to U.S.S.G. §5K2.0. The defense argued that a combination of the factors presented in the aggregate was grounds for departure, if not individually for each factor.

The defendant's adjusted offense level was calculated at 13, with a Criminal History Category of I, resulting in 12 to 18 months and a fine range of \$3,000 to \$30,000. The defense requested a sentence of probation or home detention to allow the defendant to "attend to the obligation of his life, to take care of his wife." Judge Schiller departed and sentenced the defendant to 3 years probation and a \$15,0000 fine. v

AUSA Moves for Both Downward and Upward Departures

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United States v . Purvis, 01-CR-204-6
United States v . Dennis, 01-CR-204-7
Judge Mary A. McLaughlin

Defendant Purvis (represented by Ms. Dykstra) was a salesman at a New Jersey car dealership. He was instructed by a sales manager to process and complete automobile sales to individuals referred to the dealership by the main defendant, Daryl Brown. The individuals purchased the vehicles with stolen personal identities. The defendant was also involved in the delivery of several vehicles to a drop-off point in Philadelphia. He was charged with Conspiracy, in violation of 18 U.S.C. 371, and Interstate Transportation of Stolen Vehicles, in violation of 18 U.S.C. 2312. The defendant pled guilty to all counts and was the first of the defendants to cooperate with the Government. The Government filed a motion for downward departure, pursuant to U.S.S.G. §5K1.1, for his cooperative efforts.

Defendant Dennis (represented by Mr. Ortiz) was also a car salesman at the same dealership. He was approached by Brown to take part in the scheme to provide vehicles to individuals with questionable credit, but he initially refused. Brown eventually sent customers to the defendant with what appeared to be fraudulent documentation and clean credit. The defendant processed approximately 10 applications that he knew were questionable. He was charged with Conspiracy, pursuant to 18 U.S.C. 371, and Bank Fraud, pursuant to 18 U.S.C. 1344. The defendant pled guilty to all counts and cooperated with the Government. The Government filed a motion for downward departure, pursuant to U.S.S.G. §5K1.1.

The AUSA filed motions for upward departures for both defendants on the same day that he filed the §5K1.1 motions. A two-level upward departure was requested, analogous to the upward departure in *United States v. Karro*, 257 F.3d 112 (2d Cir. 2001)(affirming a five-level upward departure in an identity theft case). The Government argued that this departure was warranted because the guidelines are driven purely by dollar loss amounts and did not account for the non-economic and intangible harms in the form of worry, inconvenience, and tarnished credit histories.

Counsel for both defendants objected to the Government's motions for upward departure in their sentencing memoranda. Both argued that the upward adjustments had already been calculated in each defendant's offense level, which adequately addressed the harm caused by their actions. They also argued that the fraud involved and the harm to the victims were not outside the "heartland" of a typical fraud case, therefore not justifying an upward departure

Defendant Purvis's adjusted offense level was calculated at 13, with a Criminal History Category of I, resulting in a guideline range of 12 to 18 months. The defense requested that the Court depart, pursuant to the §5K1.1 motion, and impose a sentence of probation or home detention. Judge McLaughlin did not grant the requested upward departure and sentenced the defendant to 4 years probation and $159,123 in restitution.

Defendant Dennis's adjusted offense was calculated at 14, with a Criminal History Category of I, resulting in a guideline range of 15 to 21 months. The defense also requested that the Court depart, pursuant to the §5K1.1 motion, and impose a non-custodial sentence based on the defendant's need for punishment, deterrence and rehabilitation. Judge McLaughlin did not grant the requested upward departure and sentenced the defendant to 1 day of imprisonment, 5 years supervised release, and $186,643 in restitution. v

Departure to Time Served from Mandatory Five Years

Contact: Eric Alexander Vos (215) 928-1100

United States v. Torres, 01-CR-135-2
Judge R. Barclay Surrick

The defendant's brother asked him to deliver an unknown package. Although the defendant was aware of his brother's involvement with illegal drugs, the defense asserted that he did not specifically know that the package contained almost one kilogram of cocaine. The defendant was arrested after delivering the package containing drugs to a prearranged location within a school zone, which location had been selected by government informants. He was charged with one count each of: Conspiracy to Possess with Intent to Distribute Cocaine, in violation of 21 U.S.C. 846; Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. 841(a)(1); and Possession with Intent to Distribute Cocaine within a School Zone, in violation of 21 U.S.C. 860(a). The defendant pled guilty and cooperated with the Government, providing information that led to the capture of his then fugitive brother and ultimately began a larger investigative process which ended in numerous arrests and anticipated convictions.

The defense moved for mitigating role and safety valve adjustments and departures based on cooperation, extraordinary family ties and responsibilities, and totality of the circumstances. The defense requested a downward adjustment based on mitigating role, pursuant to U.S.S.G. §3B1.2. The defense argued the defendant's role was scant and he did not benefit whatsoever from the offense. The defense asserted that his lack of knowledge or understanding of the scope and structure of the enterprise, as well as the activities of others, was indicative of his role as a minimal participant under §3B1.2. *See United States v. Isaza-Zapata*, 148 F.3d 236 (3d Cir. 1998).

The defense also argued that a "safety-valve" adjustment was warranted pursuant to U.S.S.G. §§2D1.1 and 5C1.2. However, despite meeting the safety-valve requirements, the defendant's 60-month mandatory minimum remained in the PSI. The defense contended that the mandatory minimum was due to the §860 schoolyard charge. However, the defense argued that the §841 drug charge is a charge specified in §5C1.2, and that §860 states §841 should be used for determining applicable penalties. Therefore, the defense argued that the mandatory minimum should not apply pursuant to the safety-valve provision.

The Government also filed motions for departure, pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. 3553(e), noting that a significant departure was warranted because the defendant had cooperated against his own brother and also worked as an undercover operative in the Government's investigation at considerable risk to himself.

The defense objected to the two-level enhancement for an offense that took place within 1,000 feet of a schoolyard because the location had been selected by parties working directly with the Government. *See United States v. Staufer,* 38 F.3d 1103 (9th Cir. 1994).

The first ground for additional departure was based on family ties and responsibilities, pursuant to U.S.S.G. §5H1.6. The defendant's wife suffers from a host of illnesses including lupus, diabetes, systemic severe arthritis, and several severe heart conditions. It was also anticipated that the wife would undergo surgery on her heart and hip in the following year. One of the couple's two children also suffers from a congenital heart defect. The wife needs constant assistance in her day-to-day living and is required to meet with physicians 3 to 4 times per week. As a result, the defendant was self-employed as a street vendor within a hundred feet of his home so that he could provide immediate aid to his wife when needed. The defendant served as his wife's primary care taker and also assumed almost all responsibilities for the physical needs of his children.

A second ground for departure was argued based on the totality of the circumstances, pursuant to U.S.S.G. §5K2.0. The defense argued that a departure was warranted because of the confluence of circumstances that included: assistance in prosecuting a family member; sentencing enhancements based on actions ultimately dictated by the Government agents; and extraordinary family circumstances.

The defendant's guideline range was calculated at a mandatory 60 months. The defense urged that the Court not use the 60 months as a point of departure but rather asked the Court to set the base offense level at 26, pursuant to §2D1.1. The defense then requested a two-level reduction pursuant to the safety valve provisions, a three-level reduction for acceptance, and a four-level reduction for minimal role, pursuant to §3B1.2, resulting in an adjusted offense level of 17. The defense then submitted that a sentence of probation or, in the alternative, a period of house arrest be imposed based upon both the Government's and defendant's grounds for departure. Judge Surrick departed and sentenced the defendant to time served and 4 years supervised release. v

Veteran s Rehabilitation Warrants Departure

Contact: Mark Wilson (215) 928-1100

United States v . Douglas, 01-CR-615
Judge William H. Yohn, Jr.

The defendant, a former United States Marine, was a post office clerk from August 1996 to June 2000. Between May and July of 1998, the defendant admittedly cashed forged personal checks in the amount of $4,308.68. During that period he also stole several boxes of personal checks mailed to post office patrons and sold them to an individual involved in a check cashing scheme that defrauded various banks. He pled guilty to one count of Misappropriation of Postal Funds, in violation of 18 U.S.C. 1711, and one count of Bank Fraud, in violation of 18 U.S.C. 1344.

The defense moved for departure on several grounds. The defense argued that a departure was warranted, pursuant to U.S.S.G. §5H1.4, for post-offense rehabilitation. The defense, citing *United States v . Brock*, 108 F.3d 31 (4th Cir. 1997), asserted that the defendant's rehabilitation was to such an exceptional degree that the situation could not be considered typical of those considered by an acceptance of responsibility adjustment.

In order to strengthen the rehabilitation argument, the defense highlighted the defendant's previous drug addiction and the resultant family consequences. Prior to the offense, the defendant had developed a drug problem, which eventually divided his family. His wife, who was also an addict, left him. The defendant originally obtained custody of their children, although the defendant's wife regained custody after she eventually overcame her drug problem. The defendant entered a drug treatment program in April 1999, subsequent to the offense that gave rise to the instant charges, but relapsed after approximately four months. With his mother's assistance, he enrolled in the Salvation Army's treatment program in April 2000, to try once again to overcome his drug addiction. The defendant remained drug-free from that time and continued to participate in an aftercare program that provided a supportive environment. Prior to sentencing, the defendant committed himself to an additional two years in the St. James Manor Program.

The defense also argued for departure on the grounds of overstatement of actual culpability, pursuant to U.S.S.G. §2B1.1, because the defendant had only received a minimal gain from his activities. *See United States v . Stuart*, 22 F.3d 76 (3d Cir. 1994). The final argument for departure was totality of circumstances, pursuant to U.S.S.G. §5K2.0. The defense also made note of the defendant's veteran status.

The defendant's adjusted offense level was calculated at 12, with a Criminal History Category of I, yielding a guideline range of 10 to 16 months. The defense requested the imposition of a sentence that would allow him to remain in his resident rehabilitation program. The St. James Manor program would not be able to accommodate a sentence of house arrest due to its federal Housing and Urban Development financing regulations. At sentencing, Judge Yohn acknowledged the "good work" of the veteran Marine. He departed on the grounds of the *Brock* argument for rehabilitation, but not on the *Stuart* argument. Judge Yohn sentenced the defendant to 1 day of imprisonment, 5 years probation, and $28,154 in restitution. v

Probation Granted in Felony Firearm Possession Case

Contact: Eric Alexander Vos (215) 928-1100

*United States v . Smith***,** 01-CR-516
Judge Robert F. Kelly

The defendant, an illiterate laborer with two prior felony convictions, test-fired a Winchester rifle in his backyard after cleaning it in his home. Police investigated a report of a single gunshot and found the weapon in the defendant's apartment. He was charged with one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. 922(g). The defendant pled guilty and cooperated with the investigation. The defendant's base offense level was calculated at 14, with a ten-level enhancement for his previous violent offenses and a three-level reduction for acceptance of responsibility. The defendant's adjusted offense level was calculated at 21, with a Criminal History Category of III, yielding a guideline range of 46 to 57 months.

The defense moved for departure on several grounds. First, pursuant to U.S.S.G. §4A1.3, the defense argued that the defendant's criminal record score over-represented his actual criminal history and offense level. The defendant's prior convictions had taken place 13 years prior to the instant offense. The first conviction, for aggravated assault, stemmed from an argument between the defendant and his aunt. The aunt had cut her hand while grabbing a kitchen knife away from the defendant. Despite the factual circumstances and the aunt's desire not to further pursue the matter in court, the defendant was counseled into entering a guilty plea and did not serve time in prison. The second offense took place two months later when the defendant was attacked at knifepoint during a robbery. After being stabbed in the chest himself, the defendant disarmed the attacker, fought off the assailant, and stabbed

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him in the chest. Again, despite the circumstances and the non-appearance of the assailant in court, the defendant was counseled into entering a guilty plea and was sentenced to time served. The defense submitted that the circumstances surrounding the previous offenses, the time elapsed since the offenses, and the brief two-month time period in which they took place overstated his criminal history and likelihood for recidivism, pursuant to §4A1.3. *See United States v . Shoupe*, 988 F.2d 440 (3d Cir. 1993)("Shoupe II")(reduction of criminal history category); *United States v . Shoupe*, 35 F.3d 835 (3d Cir. 1994)("Shoupe III")(reduction of base offense level). The defense argued that, given the circumstances, the defendant's criminal history score would be more appropriately found in Category I rather than III. The defense also requested that the Court reevaluate the seriousness of the prior offenses and accordingly adjust his offense level of 21, which had been "artificially elevated" by his criminal history, to a more "appropriate" level.

The second argument for departure was based on the grounds that the offense fell outside of the heartland of a typical offense, pursuant to U.S.S.G. §5K2.0. The defense argued that this offense was atypical of a felon in possession charge because the defendant, an avid hunter prior to his convictions, had received the rifle from a friend for the sole purpose of hunting. On the night of the offense, the defendant had simply cleaned the rifle and test fired it into an abandoned air conditioner on his property. The defense requested departure, as provided by *Koon v . United States,* 116 S.Ct. 2035 (1996), because the defendant's conduct was highly atypical of the average felon in possession.

A third argument for departure was based on lesser harms, pursuant to U.S.S.G. §5K2.11. The defense asserted that the defendant's possession of the firearm had nothing to do with the purpose that prompted the enactment of the felon in possession law, to help insure that people with dangerous propensities do not possess weapons.

The final argument was based upon a totality of circumstances, pursuant to §5K2.0. The defense argued that even if the Court did not depart on the basis of the separate issues presented, a departure was still warranted on the motions when viewed in the aggregate. *See United States v . Broderson*, 67 F.3d 452 (2nd Cir. 1995).

The defense requested a sentence of probation or, in the alternative, a short period of house arrest or community confinement, which the Government strongly opposed. Judge Kelly granted the departure and sentenced the defendant to 5 years probation and a $2,500 fine. v

Departures Despite Positive Drug Tes

Contact: Christopher D. Warren (215) 546-2604

United States v. Simmons, 01-CR-483
Judge Jay C. Waldman

The defendant, along with several codefendants, was dealing crack cocaine out of a school when several Philadelphia police officers arrived at the scene to arrest them. A police officer caught the defendant as he attempted to flee the scene. During the ensuing struggle with the officer, drugs fell from the defendant's person and the defendant attempted to draw a gun from his waistband. The defendant was subdued and arrested. He was charged with Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); Possession with Intent to Distribute Cocaine Base within 1,000 Feet of a School, in violation of 21 U.S.C. 860(a); and Carrying a Firearm in Relation to a Drug Trafficking Offense, in violation of 18 U.S.C. 924(c)(1)(A). The defendant pled guilty to the schoolyard drug charge and the firearm charge and cooperated with the Government. The defendant provided information on drug distribution and gun trafficking operations in Philadelphia. The information lead to a state search warrant, which recovered drugs and firearms, and the arrest and prosecution of two individuals.

While the defendant was incarcerated, post-plea and before a §5K1.1 motion was filed, he tested positive for morphine in his system. A deadly weapon (shank) was also recovered from his cell, which compounded his situation, but was later attributed to his cellmate. Despite these violations, the AUSA filed motions for departure, pursuant to U.S.S.G. §5K1.1 and 18 U.S.C. 3553(e), based on the defendant's cooperative efforts. Initially, the defendant disputed the morphine test, but eventually agreed not to litigate that issue before the Judge.

The defendant's offense level was calculated at 23, with a Criminal History Category of III, resulting in 57 to 71 months, with an additional consecutive 60 months for the firearm violation. At sentencing, defense counsel urged the Court to depart based on the §5K1.1 motion, despite the defendant's actions in prison. The defense argued that without departure, any rehabilitative prison purpose would fail since the defendant would still be released from prison as a relatively young man yet he would be bitter for not having receiving credit for his cooperative efforts. The Judge departed on both the §5K1.1 and the §3553(e) motions and sentenced the defendant to 36 months on the possession charge and 36 months, to be served consecutively, on the firearm charge. v

Creative Cooperative Efforts Yield Significant Departure

Contact: John F. Pyfer, Jr. (717) 299-7342

United States v . Stoltzfus. 98-CR-291-9
Judge Clarence C. Newcomer

The defendant, an Amish man from Lancaster County, opened a roofing company with his codefendant, who was also Amish. As business increased, the defendants hired members of the Pagan motorcycle gang to help with the workload. The Pagans introduced the defendants to cocaine. The Amish defendants then began bringing the drugs to "hoe-downs" for other youths to sample and eventually began selling the drugs. These hoe-downs are part of the Amish tradition of wild parties called *rumspringa*, a time when Amish youths are encouraged to experience the world and allowed to gather in informal "gangs" before committing themselves to the church. The different gangs sponsor the hoe-downs, which often include live rock music, alcohol, and drugs. The defendant was indicted based upon information provided by one of his Pagan employees, who was an undercover FBI informant. The defendant was charged with Conspiracy to Distribute Cocaine and Methamphetamine, in violation of 21 U.S.C. 846, and Criminal Forfeiture, in violation of 21 U.S.C. 853(a)(1)-(2) and (p).

The defendant pled guilty and cooperated with the Government. The AUSA and federal drug investigators agreed to the defense's creative cooperation proposal that the two Amish defendants present drug awareness meetings in their community to warn other Amish youths about the dangers of drugs. The program called attention to the previously overlooked prevalence of drug use among young people within the communities, a problem that had been unknown to the church elders. Three hundred Amish attended the first meeting and the program eventually reached approximately 10,000 to 12,000 individuals in the eastern Pennsylvania Amish and Mennonite communities. The defendant also wore a wire under his broad brimmed hat, at substantial risk to himself, and recorded conversations with the Pagans, which lead to further arrests and the entry of pleas by all of the defendants.

The defendant's offense level was calculated at 21, with a Criminal History Category of I, resulting in a guideline range of 37 to 46 months, with a 5-year mandatory term of imprisonment and a fine range of $10,000 to $2,000,000. The Government filed motions for downward departure, pursuant to U.S.S.G. §5K1.1 and 18 U.S.C. 3553(e), for the defendant's substantial cooperation. At sentencing, the defense called the FBI agent involved in the case as its primary witness. The agent testified that the meetings conducted with the Amish defendants had made such a large impact that drug use among the Amish had fallen by approximately forty percent. Judge Newcomer granted the §5K1.1 and §3553(e) motions and sentenced the defendant to 12 months imprisonment at a halfway house, 5 years supervised release, and a $1,000 fine. The defendant was ordered into an outmate program 20 miles from his community with work release. v

Sally and *Brock* Arguments Result in Significant Departures

Contact: Anthony F. List (610) 565-6760

United States v . Ellis, 00-CR-748-2
Judge R. Barclay Surrick

The defendant and several codefendants were involved in a drug transportation conspiracy from several surrounding states into the Philadelphia area for distribution. The DEA conducted an investigation and orchestrated a sting operation with an undercover federal agent placed inside the conspiracy. As a result, the defendant was charged with Conspiracy to Distribute Three Kilograms of MDMA, in violation of 21 U.S.C. 846; Possession with Intent to Distribute MDMA, in violation of 12 U.S.C. 841(a)(1); and Possession with Intent to Distribute MDMA within 1,000 Feet of a School, in violation of 21 U.S.C. 860. The defendant pled guilty to the conspiracy and schoolyard charges and cooperated with the Government.

The Government filed a motion for downward departure, pursuant to U.S.S.G. §5K1.1, for the defendant's cooperative efforts. In its sentencing memo, the defense presented an additional basis for departure for post-offense rehabilitation, pursuant to *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997). After the defendant was arrested, he became actively involved in Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA"). The defendant received his NA medallion for one year of remaining clean and sober and continued as an active member reaching out to other addicts that needed help. He also enrolled in school, achieved a high grade point average, and received numerous academic awards. The defendant resumed his activities with his church, which included contributions to various missionary efforts. The defense argued that the defendant's post-offense rehabilitation was to such an exceptional degree as to qualify as a basis for departure, pursuant to *United States v . Brock*, 108 F.3d 31 (4th Cir. 1997). The Government opposed the additional arguments for departure.

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At the sentencing hearing, the defendant presented significant character attestations on his own behalf. He filed approximately thirty-five character letters, including ones from his pastor and several professors. In addition, eight character witnesses testified on the defendant's behalf at sentencing.

The defendant's offense level was calculated at 25, with a Criminal History Category III, resulting in a guideline range of 70 to 87 months. The Court granted the defense's motion for departure in addition to the §5K1.1 motion. Judge Surrick stated that the characteristics of the defendant's rehabilitation exemplified the criteria for a *Sally* departure. The defendant was sentenced to 24 months imprisonment and 3 years supervised release. v

Shoupe Departure for Career Offender

Contact: Patrick J. Egan (215) 574-1080

United States v . Campbell, 01-CR-378
Judge Harvey Bartle, III

The defendant sold marijuana to an informant in a Philadelphia bar while being observed by an undercover police officer. In a separate instance, an undercover police officer also purchased cocaine through the defendant. Additional cocaine, paraphernalia, and a gun were recovered through a search warrant executed on the defendant's apartment. The defendant was arrested and charged with six drug possession and distribution counts and a felony weapon possession charge. The defendant pled guilty to one count each of Distribution of Marijuana in a School Zone, Distribution of Cocaine in a School Zone, and Possession of Cocaine in a School Zone, all in violation of 21 U.S.C. 860(a). The other charges were dismissed by the Government. As a result of two prior drug convictions, the defendant was classified as a career offender under the guidelines and placed in a Criminal History Category of VI. The defendant's offense level, calculated at 32, combined with his criminal history, resulted in a guideline range of 210 to 262 months.

The defense filed a motion for departure, pursuant to *United States v . Shoupe*, 35 F.3d 835 (3d Cir. 1994), for overstatement of prior record score. The defendant's two prior convictions were more than ten and five years old, respectively. The combined drug weight from the two prior offenses would not have been enough for a one-year mandatory sentence in the state court system. The total amount of drugs in the present case, absent the career offender designation, would have yielded an adjusted offense level of 14, with a guideline range of 18 to 24 months. The defense argued that the classification as a career offender overstated the defendant's prior history of selling small quantities of drugs to support his admitted drug addiction.

The Government opposed the motion, citing that a departure for overstatement of prior record score was not justified. The Government stated that the defense's argument for downward departure pursuant to *Shoupe* necessarily meant that those who deal in small quantities of drugs fall outside the "heartland" of career offender status. The Government contended that this misconstrued the heartland of the career offender guideline, which applies to all recidivist criminals who repeatedly commit felony drug-trafficking offenses, regardless of the severity of the predicate offenses. The Government also argued that the temporal distance of the prior convictions was a weak basis for departure. In the event that the Court did decide to depart, the Government still requested the imposition of a substantial period of imprisonment, an $8,000 fine, and 12 years of supervised release.

Judge Bartle departed from the guideline range of 210 to 262 months and sentenced the defendant to 54 months imprisonment, 5 years supervised release, and no fine. v

Departures for Cooperation in Drug Distribution Conspiracy

Contacts: Leon W. Tucker (215) 568-8040
William J. Brennan (215) 851-0700

United States v . Bailey, 99-CR-631-1 & 14
Judge Anita B. Brody

A marijuana distribution operation, based in North Philadelphia for approximately 10 years, was structured as a sophisticated assembly line involving a network of purchasers, baggers, and distributors. Drugs were brought in from Arizona, Georgia, and Mexico. The case involved a government investigation of 14 individuals with surveillance, informants, and search warrants. Apart from the ringleader, all of the codefendants pled guilty and cooperated except for one, who pled guilty without cooperating because he was involved in a dispute with government over the quantity of drugs involved.

Defendant Brian Bailey (represented by Mr. Tucker), the ringleader of the operation, pled guilty to Conspiracy to Distribute Marijuana, in violation of 21 U.S.C. 846. The defendant cooperated against the one remaining codefendant. His adjusted offense level was calculated at 41, with a Criminal History Category of I, resulting in a guideline range of 324 to 405 months, with a 10-year mandatory minimum term of imprisonment.

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The Government filed a motion for downward departure, pursuant to U.S.S.G. §5K1.1. Judge Brody departed and sentenced the defendant to 156 months, 10 years supervised release, and a $2,000 fine. A superceding money laundering indictment had also been returned and the defendant's sentence was to be served concurrently with the sentence imposed in that case.

Defendant Sharon Bailey (represented by Mr. Brennan) was a relative of Brian Bailey. She had held legitimate jobs for the majority of her adult life, but she began working in the operation in a minor role as a bagger after being laid off. She was charged with Conspiracy to Distribute Marijuana, in violation of 21 U.S.C. 846. She pled guilty and cooperated. The defendant's offense level was calculated at 29, with a Criminal History Category of I, resulting in a guideline range of 87 to 108 months. A 10-year mandatory minimum raised her guideline range to 120 months.

The Government filed motions for departure, pursuant to U.S.S.G. §5K1.1 and 18 U.S.C. 3553(e). Judge Brody departed below the mandatory minimum and sentenced the defendant to 30 months imprisonment and 5 years supervised release. The defendant's sentence was structured by the Court so that shortly after sentencing, she would receive an 85% time served credit and be released. v

Departure to Probation in Medical Examiner s Office Case

Contact: Stephen B. Jarrett (215) 545-6070

United States v . Henry, 00-CR-667-4
Judge Patrese B. Tucker

The defendant was involved in a loose theft ring comprised of workers at the Medical Examiner's ("ME") Office. As described in the often macabre proffer sessions, the theft ring eventually deteriorated to the point where after the ME workers received "flash" information about a body to be picked up, they would scramble "like fighter pilots" to get to the scene first to steal valuables from the body and the residence. Once at the scene, the ME workers would remove cash, credit cards, and any other items of value that were found.

On one occasion, the workers discovered a large collection of quarters at the residence of a 350-pound man who had died. After an attempt to remove the quarters with plastic grocery bags failed because the bags ripped, the ME workers loaded the coins with the corpse into the body bag. As they were removing the body, the body bag ripped from the added weight and the coins spilled out again. Although police officers were present on the scene during the entire time, no action was taken.

The charges against the defendant stemmed from a separate credit card fraud investigation. The defendant, while on duty with the ME, had stolen credit cards from a body and sold the cards to a government informant who was using government funds to buy the cards. When the defendant was arrested, a gun the defendant had stolen from another body was also found in his possession. The defendant was linked to the Government's separate ME office investigation as a result of the information from the credit card fraud investigation. He was charged with one count each of Conspiracy to Commit Credit Card Fraud, in violation of 18 U.S.C. 1029(b)(2), and Possession of Stolen Firearms, in violation of 18 U.S.C. 922(j).

The defendant pled guilty and cooperated with the Government's ME Office investigation. His offense level was calculated at 12, with a Criminal History Category of I, resulting in a guideline range of 10 to 16 months. The government filed a motion for downward departure, pursuant to U.S.S.G. §5K1.1, for the defendant's cooperation. Judge Tucker departed and sentenced the defendant to 4 years probation and $28,665 in restitution.v

/5K1 DEPARTURE BRIEFS

Contact: Nino V. Tinari (215) 790-4010
United States v . Myrie, 01-CR-42-2
Judge Bruce W. Kauffman

Defendant was caught on audio and video surveillance laundering drug proceeds and forwarding the funds out of the country as part of a large conspiracy. She pled guilty to Conspiracy to Distribute Marijuana, in violation of 21 U.S.C. 846; Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. 1956(h); and False Statements, in violation of 18 U.S.C. 1001.

The defendant cooperated with the Government investigation. Her offense level was calculated at 29, with a Criminal History Category of III, resulting in a guideline range of 108 to 135 months, with a 4-year mandatory term of imprisonment due to the large quantity of drugs involved. The Government filed motions for downward departure, pursuant to U.S.S.G. §5K1.1 and 18 U.S.C. 3553(e). The defense argued for additional reduction for the defendant's minimal role because the defendant played a relatively minor part in the larger conspiracy. Judge Kauffman departed and sentenced the defendant to 42 months imprisonment and 2 years supervised release. ∨

Contact: Eric Alexander Vos (215) 928-1100
United States v . Ford, 01-CR-592
Judge Mary A. McLaughlin

The defendant deposited a $6,500 dollar forged check given to him by another party. He was charged with Bank Fraud, in violation of 18 U.S.C. 1344. The defendant pled guilty and cooperated against the party who had given him the false check. The defendant's guideline range fell in Zone B. Probation was not available for the bank fraud charge. The Government filed a motion for downward departure, pursuant to U.S.S.G. §5K1.1. Judge McLaughlin departed and sentenced the defendant to the custody of the U.S. Marshals Office for the time it took for processing, 3 years supervised release, and $6,500 in restitution. ∨

Contact: Wayne R. Maynard (215) 569-2525
United States v . Jones, 00-CR-667-16
Judge Patrese B. Tucker

The defendant was an employee of a Medical Examiner's Office. He stole a gun from a body and also mailed falsified records of personal effects to the next-of-kin of deceased individuals. The defendant was charged with Possession of a Stolen Firearm, in violation of 18 U.S.C. 922(j), and Mail Fraud, in violation of 18 U.S.C. 1341. He pled guilty and cooperated with the Government.

The defendant's offense level was calculated at 21, with a Criminal History Category of III, resulting in a guideline range of 46 to 57 months. The Government filed a motion for downward departure, pursuant to U.S.S.G. §5K1.1. Judge Tucker departed and sentenced the defendant to 20 months imprisonment, 3 years supervised release, and $5,000 in restitution. ∨

Contact: Peter J. Scuderi (215) 546-5650
United States v . Tashie, 00-CR-371
Judge Anita B. Brody

The defendant was involved in an illegal bookmaking business. He was charged with Illegal Gambling Business, in violation of 18 U.S.C. 1955. The defendant pled guilty and cooperated with a Government investigation. The defendant's offense level was calculated at 12 with a Criminal History Category of I, resulting in a guideline range of 10 to 16 months. The Government filed under seal a motion for departure, pursuant to U.S.S.G. §5K1.1. Judge Brody departed and sentenced the defendant to 30 months probation and a $3,000 fine. ∨

Contact: Stephen P. Patrizio (215) 569-2121
United States v . Artemus, 00-CR-611-1
Judge J. Curtis Joyner

The defendant and a codefendant were involved in a food stamp fraud scheme. The defendant purchased food stamps for 70 to 80% of the face value, then submitted them for full reimbursement. The conspiracy operated for more than a year out of the defendant's West Philadelphia business and resulted in a loss of over $1,000,000. The defendant was arrested and immediately confessed. He was charged with one count of Conspiracy to Commit Food Stamp Access Device Fraud, in violation of 18 U.S.C. 371; five counts of Food Stamp Access Device Fraud, in violation of 7 U.S.C. 2024(b); and fifteen counts of Money Laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii).

The codefendant cooperated first against the defendant. Then the defendant further cooperated with the Government by providing information in another ongoing investigation. The defendant was facing a potential statutory maximum of 405 months imprisonment for the offenses. The Government filed under seal a motion for downward departure, pursuant to U.S.S.G. §5K1.1, for the defendant's cooperative efforts. Judge Joyner departed and sentenced the defendant to 9 months imprisonment, 3 years supervised release, and $1,326,844 in restitution to be paid jointly and severally with his codefendant. v

PRACTICE POINTS

Gordon Prompts Correction in Aiding and Abetting Jury Instruction

Contacts: Eric W. Sitarchuk (215) 864-8220
Jessica Natali (215) 864-8288
United States v. Zheng, 01-CR-787
Judge Clarence C. Newcomer

The defendant was allegedly involved in a loan sharking operation based in an Atlantic City casino. The main defendant, Kong Chen, loaned money to Chinese patrons of the casino in exchange for their green cards as collateral. Charges arose out of a conspiracy to kidnap and demand ransom for a Chinese national. The Government alleged that the kidnapping plot was a result of an old unpaid gambling debt. The defendant, Kong Chen's girlfriend, was charged with one count each of: Conspiracy to Commit Hostage Taking and Hostage Taking, both in violation of 18 U.S.C. 1203(a); Conspiracy to Communicate in Interstate Commerce a Demand for Ransom for the Release of a Kidnapped Person, in violation of 18 U.S.C. 371; Communication in Interstate Commerce of a Demand for Ransom for the Release of a Kidnapped Person, in violation of 18 U.S.C. 875(a); and Aiding and Abetting, in violation of 18 U.S.C. 2, on the second, third, and fourth counts. The defendant pled not guilty and the case went to trial.

The defense argued that the defendant was merely present during the alleged abduction and anything that she did that may have helped the conspiracy was merely incidental and was not done with the intent to help the kidnapping succeed. The defense also submitted evidence that she had previously been beaten by Kong Chen, the main defendant, and that she was not in a position to stop what was occurring.

The Government filed a motion to admit Rule 404(b) evidence, including casino surveillance tapes of the defendant and Kong Chen handing out large amounts of cash, making notes in ledgers, and partaking in an altercation with an alleged debtor. The defense argued that there was no proper purpose under 404(b) for this evidence. The Government withdrew its motion.

After the jury deliberations began, the defense presented the Court with a Third Circuit slip opinion in *United States v. Gordon*, 290 F.3d 539 (3d Cir. 2002), issued two days earlier, but after the jury had been instructed. *Gordon* modified what had previously been a standard widely-used aiding and abetting jury instruction, Instruction No. 11.01 from Leonard B. Sand's *Modern Federal Jury Instructions*. The original instruction listed the elements of aiding and abetting in three questions, instructing the jury that if the answer to all three questions was in the affirmative, then the defendant should be found guilty, while if the answer to the three questions were "all" in the negative, then the defendant should be found not guilty. The Third Circuit held that an incorrect inference could be drawn that one or two negative answers could still support a guilty verdict. The Court stated that the instruction should read "If, on the other hand, any one of your answers to these three questions is 'no,' then the defendant is not an aider and abettor, and you must find him not guilty." *Gordon*, 290 F.3d at n1. The erroneous instruction in *Gordon* was identical to the aiding and abetting instruction given in this case. Judge Newcomer recalled the jury and re-instructed them with the new *Gordon* jury instruction.

The jury, composed of ten women and two men, found the defendant not guilty on all counts. Kong Chen was found guilty on all counts and the third codefendant was found guilty of kidnapping, but not of the interstate wire communications. v

PSI Recommends Reduction Despite Initial Government Opposition

Contact: Peter J. Scuderi (215) 546-5650
United States v. Kincade, 01-CR-406
Judge Robert F. Kelly

The defendant mailed a threatening letter to a former employer containing an indirect threat referencing a newspaper article about the growing trend of people "going postal" on former employers and attorneys. The defendant pled guilty to one count of Mailing Threatening Communications, in violation of 18 U.S.C. 876.

The defendant's base offense level was calculated at 12, with a Criminal History Category of I, resulting in a guideline range of 10 to 16 months. The defense argued for a downward adjustment, pursuant to §2A6.1(b)(4). Section 2A6.1(b)(4) states that a four level reduction is warranted if the offense meets the following criteria:

- the offense was a single instance evidencing little or no deliberation;
- the defendant was not convicted under 47 U.S.C. §223(a);
- there was no evidence of intent to carry out the threat;
- no additional threats were involved; and
- the communication did not violate a court protection order.

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The Government initially opposed this downward adjustment and refused to include it in the language of the plea agreement.

Despite the Government's reluctance and the silence of the plea on the subject of the four-level reduction, the Probation Officer recommended the reduction adjustment in the PSI. The Government did not oppose the adjustment and the defense chose not to present any additional arguments for departure. The adjustment brought the defendant's offense level to 8 in Zone A, resulting in a guideline range of 0 to 6 months. The defendant was sentenced to 5 years probation. v

Revised Guidelines Reduce Total Offense Level

Contact: Harvey A. Sernovitz (215) 735-8100

United States v . Mount, 01-CR-600
Judge Berle M. Schiller

The defendant was a postal worker who took advantage of the primitive accounting system in use at the time to steal money. The Post Office's system was not networked; the accounting was partially done by hand and partially by computer. The defendant removed funds from Bulk Mailing and Business Reply accounts and circumvented the proper accounting procedures, taking approximately $26,000 over a period of two years and nine months. He was charged with one count of Misappropriation of Postal Funds, in violation of 18 U.S.C. 1711. The defendant pled guilty and cooperated with the Government by explaining how he committed the offenses and highlighting the deficiencies in the system. Since that time, the accounting system at the Post Office was updated and networked. However, Postal Inspectors refused to acknowledge that this was a direct result of the defendant's cooperation. The defendant also applied his pension fund to the restitution and paid the amount in full prior to sentencing.

The 1998 edition of the Federal Sentencing Guideline Manual, dating from the time of the actual offense, was initially used to calculate the guideline range. The defendant's base offense level was 4, with an six-level increase for the amount of the loss, a two-level increase for more than minimal planning, and a two-level reduction for acceptance of responsibility. The defendant's adjusted offense level was 10, with a Criminal History Category of I, resulting in a guideline range of 6 to 12 months. The Government refused to concede the more than minimal planning enhancement.

It was subsequently determined that, if the defendant's guideline range were calculated pursuant to the revised 2001 edition of the Guideline Manual, his adjusted offense level would be lower. In the 2001 revision, the economic crime loss tables were updated, resulting in more lenient penalties for lower end offenses while increasing the penalties for middle and high offense ranges. The Government agreed to amend the defendant's offense level and calculate it under the new guidelines. The defendant's base offense level was recalculated at six, with a four-level enhancement for the loss amount and a two-level reduction for acceptance. The more than minimal planning enhancement had been eliminated from the revised guidelines and factored into the new loss table.

The defendant's new adjusted offense level of 8, with a Criminal History Category of I, resulted in a guideline range of 0 to 6 months in Zone A. The potential fine for the offense was $1,000 to $10,000. The Government agreed to recommend the lowest fine. Judge Schiller sentenced the defendant to 3 years probation and a $1,000 fine. v

New EC Features Help Defeat Enhancements

Contact: David M. Kozlow (215) 928-1100

United States v. Paramour, 00-CR-258

Judge Anita B. Brody

The defendant, a bookkeeper at a credit union, embezzled money from the credit union and issued several unauthorized short-term loans to third parties. The defendant was charged with one count of Bank Fraud, in violation of 18 U.S.C. 1344, and thirty-eight counts of Embezzlement by Credit Union Employee, in violation of 18 U.S.C. 657. The loss to the credit union was calculated at $92,701. The defendant was tried and convicted on all charges.

The defendant's original offense level was calculated at 28, with a Criminal History Category of I, yielding a guideline range of 78 to 97 months. The PSI recommended upward enhancements for abuse of a position of trust, jeopardizing the solvency of a financial institution, and obstruction of justice. The defense argued against the jeopardizing solvency and obstruction enhancements.

The solvency enhancement was based on the credit union's claim that it had lost members as a result of the offense and would have become insolvent without bonding. The defense disputed this allegation and presented evidence that members of the credit union's Board of Directors had taken out several personal loans from the union themselves, suggesting that the defendant's actions were not uncommon at the credit union.

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The obstruction enhancement was added because the defendant had allegedly forged the signature of the president of the credit union on a document authorizing her to issue short-term loans. The "Trial Director" system was used in the courtroom. This system, part of the new electronic courtroom features, allows documents to be scanned, displayed, and manipulated on screens around the courtroom. The defense used the system at trial to show the president of the credit union a split-screen image of a document, which bore the president's authentic signature alongside the document with her alleged forged signature. The president admitted that both appeared to be her signature, strengthening the defense's argument against the forgery.

Given the evidence presented at trial, the defense negotiated with the Government to strike the solvency and obstruction enhancements and revise the calculations in the PSI. As a result, both the defense and the Government agreed not to move for departure or appeal any of the trial issues. The defendant's revised offense level was calculated at 16, resulting in a guideline range of 21 to 27 months. Judge Brody sentenced the defendant to the bottom of the range at 21 months imprisonment, 5 years supervised release, and $92,701 in restitution. v

The Reliable Source welcomes reports and advice from fellow practitioners who have information they would like to share with the federal criminal defense bar. Please address all questions or comments to:

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